

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

TIMOTHY SLATE,

Plaintiff

v.

KILOLO KIJAKAZI,
Acting Commissioner of Social
Security Administration,

Defendant

Case No.: 3:21-cv-00298-CSD

Order

Re: ECF Nos. 20, 21

Before the court is Plaintiff's Motion for Summary Judgment. (ECF No. 20.) The Acting Commissioner filed a Cross-Motion to Affirm and Response to Plaintiff's motion. (ECF Nos. 21, 22.) Plaintiff filed a response to the cross-motion. (ECF No. 26.)

For the reasons stated below, Plaintiff's motion is granted insofar as this matter is remanded for further administrative proceedings consistent with this Order, and the Acting Commissioner's cross-motion to affirm is denied.

I. BACKGROUND

In August of 2015, Plaintiff completed applications for disability insurance benefits (DIB) under Title II of the Social Security Act and for supplemental security income (SSI) under Title XVI of the Social Security Act. (Administrative Record (AR) 213-216.) While he originally alleged disability beginning on April 15, 2005, the onset date was subsequently amended to March 12, 2013. (AR 36-37, 448.) The applications were denied initially and on reconsideration. (AR 130-139, 143-149.)

1 Plaintiff requested a hearing before an administrative law judge (ALJ). (AR 151-152.)
2 ALJ Janice Shave held a hearing on July 13, 2018. (AR 31-69.) Plaintiff, who was represented
3 by counsel, appeared and testified on his own behalf at the hearing. Testimony was also taken
4 from a vocational expert (VE), Kristan Cicero. On November 8, 2018, ALJ Shave issued a
5 decision finding Plaintiff not disabled. (AR 13-24.) Plaintiff requested review, and the Appeals
6 Council denied the request, making the ALJ Shave's decision the final decision of the
7 Commissioner. (AR 2-7.) On November 12, 2019, Plaintiff commenced an action for judicial
8 review under 42 U.S.C. § 405(g), which was assigned case number 3:19-cv-00682-CLB.
9 (AR 498-500.) After Plaintiff filed his motion for summary judgment, the parties stipulated to
10 remand the case for further administrative proceedings pursuant to sentence four of 42 U.S.C.
11 § 405(g). (AR 504-08.)

12 The Appeals Council vacated ALJ Shave's decision and remanded the case to another
13 ALJ. (AR 514-516.) ALJ William Kurlander held a hearing on February 10, 2021. (AR 439-
14 471.) Plaintiff appeared, represented by counsel, and testified on his own behalf at the hearing.
15 Testimony was also taken by VE Alan Cummings. On April 5, 2021, ALJ Kurlander issued a
16 decision finding Plaintiff not disabled. (AR 414-432.)

17 Plaintiff then commenced this action for judicial review under 42 U.S.C. § 405(g).
18 Plaintiff argues: (1) the two ALJs impermissibly manipulated their residual functional capacity
19 (RFC) findings to reach a predetermined finding of nondisability; (2) the ALJs failed to
20 adequately address the opinions of consultative examining psychologist Paul Binks, Ph.D.; and
21 (3) ALJ Kurlander failed to properly assess Plaintiff's credibility.

1 The Acting Commissioner, on the other hand, argues: (1) substantial evidence supported
2 the RFC finding; (2) the ALJ properly evaluated Dr. Binks's opinions; and (3) the ALJ properly
3 discounted Plaintiff's subjective symptom testimony.

4 II. STANDARDS

5 A. Five-Step Evaluation of Disability

6 Under the Social Security Act, "disability" is the inability to engage "in any substantial
7 gainful activity by reason of any medically determinable physical or mental impairment which
8 can be expected to result in death or which has lasted or can be expected to last for a continuous
9 period of not less than 12 months." 42 U.S.C. § 1382c(a)(3)(A). A claimant is disabled if his or
10 her physical or mental impairment(s) are so severe as to preclude the claimant from doing not
11 only his or her previous work but also, any other work which exists in the national economy,
12 considering his age, education and work experience. 42 U.S.C. § 1382c(a)(3)(B).

13 The Commissioner has established a five-step sequential process for determining whether
14 a person is disabled. 20 C.F.R. § 404.1520 and § 416.920; *see also Bowen v. Yuckert*, 482 U.S.
15 137, 140-41 (1987). In the first step, the Commissioner determines whether the claimant is
16 engaged in "substantial gainful activity"; if so, a finding of nondisability is made and the claim is
17 denied. 20 C.F.R. § 404.152(a)(4)(i), (b); § 416.920(a)(4)(i); *Yuckert*, 482 U.S. at 140. If the
18 claimant is not engaged in substantial gainful activity, the Commissioner proceeds to step two.

19 The second step requires the Commissioner to determine whether the claimant's
20 impairment or combination of impairments are "severe." 20 C.F.R. § 404.1520(a)(4)(ii), (c) and
21 § 416.920(a)(4)(ii), (c); *Yuckert*, 482 U.S. at 140-41. An impairment is severe if it significantly
22 limits the claimant's physical or mental ability to do basic work activities. *Id.* If the claimant has
23 an impairment that is severe, the Commissioner proceeds to step three.

1 In the third step, the Commissioner looks at a number of specific impairments listed in
2 20 C.F.R. Part 404, Subpart P, Appendix 1 (Listed Impairments) and determines whether the
3 claimant's impairment meets or is the equivalent of one of the Listed Impairments. 20 C.F.R.
4 § 404.1520(a)(4)(iii), (d) and § 416.920(a)(4)(iii), (d). The Commissioner presumes the Listed
5 Impairments are severe enough to preclude any gainful activity, regardless of age, education or
6 work experience. 20 C.F.R. § 404.1525(a), § 416.925(a). If the claimant's impairment meets or
7 equals one of the Listed Impairments, and is of sufficient duration, the claimant is conclusively
8 presumed disabled. 20 C.F.R. § 404.1520(a)(4)(iii), (d), § 416.920(a)(4)(iii), (d). If the claimant's
9 impairment is severe, but does not meet or equal one of the Listed Impairments, the
10 Commissioner proceeds to step four. *Yuckert*, 482 U.S. at 141.

11 At step four, the Commissioner determines whether the claimant can still perform "past
12 relevant work." 20 C.F.R. § 404.1520(a)(4)(iv), (e), (f) and § 416.920(a)(4)(iv), (e), (f). Past
13 relevant work is that which a claimant performed in the last 15 years, which lasted long enough
14 for him or her to learn to do it, and was substantial gainful activity. 20 C.F.R. § 404.1565(a) and
15 § 416.920(a).

16 In making this determination, the Commissioner assesses the claimant's residual
17 functional capacity (RFC) and the physical and mental demands of the work previously
18 performed. *See id.*; 20 C.F.R. § 404.1520(a)(4)(v), § 416.920(a)(4)(v); *see also Berry v. Astrue*,
19 622 F.3d 1228, 1231 (9th Cir. 2010). RFC is what the claimant can still do despite his or her
20 limitations. 20 C.F.R. § 404.1545 and § 416.945. In determining the RFC, the Commissioner
21 must assess all evidence, including the claimant's and others' descriptions of the limitations, and
22 medical reports, to determine what capacity the claimant has for work despite his or her
23 impairments. 20 C.F.R. § 404.1545(a)(3) and 416.945(a)(3).

1 A claimant can return to previous work if he or she can perform the work as he or she
2 actually performed it, *i.e.*, if he or she can perform the "actual functional demands and job duties
3 of a particular past relevant job," or as generally performed, *i.e.*, "[t]he functional demands and
4 job duties of the [past] occupation as generally required by employers throughout the national
5 economy." *Pinto v. Massanari*, 249 F.3d 840, 845 (9th Cir. 2001) (internal quotation marks and
6 citation omitted). If the claimant can still do past relevant work, then he or she is not disabled.
7 20 C.F.R. § 404.1520(f) and § 416.920(f); *see also Berry*, 62 F.3d at 131.

8 If, however, the claimant cannot perform past relevant work, the burden shifts to the
9 Commissioner to establish at step five that the claimant can perform other work available in the
10 national economy. 20 C.F.R. §§ 404.1520(e), 416.920(e); *see also Yuckert*, 482 U.S. at 141-42,
11 144. This means "work which exists in significant numbers either in the region where such
12 individual lives or in several regions of the country." *Gutierrez v. Comm'r of Soc. Sec. Admin.*,
13 740 F.3d 519, 528 (9th Cir. 2014). The Commissioner must also consider the claimant's RFC,
14 age, education, and past work experience to determine whether the claimant can do other work.
15 *Yuckert*, 482 U.S. at 141-42. The Commissioner may meet this burden either through the
16 testimony of a VE or by reference to the Grids. *Tackett v. Apfel*, 180 F.3d 1094, 1100 (9th Cir.
17 1999).

18 If the Commissioner establishes at step five that the claimant can do other work which
19 exists in the national economy, then he or she is not disabled. 20 C.F.R. § 404.1566(b),
20 § 416.966(b). Conversely, if the Commissioner determines the claimant is unable to adjust to any
21 other work, the claimant will be found disabled. 20 C.F.R. § 404.1520(g), § 416.920(g); *see also*
22 *Lockwood v. Comm'r Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010); *Valentine v.*
23 *Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009).

1 C. Judicial Review & Substantial Evidence

2 The court must affirm the ALJ's determination if it is based on proper legal standards and
3 the findings are supported by substantial evidence in the record. *Gutierrez*, 740 F.3d at 522
4 (citing 42 U.S.C. § 405(g)). "Substantial evidence is 'more than a mere scintilla but less than a
5 preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to
6 support a conclusion." *Id.* at 523-24 (quoting *Hill v. Astrue*, 698 F.3d 1153, 1159 (9th Cir.
7 2012)).

8 To determine whether substantial evidence exists, the court must look at the record as a
9 whole, considering both evidence that supports and undermines the ALJ's decision. *Gutierrez*,
10 740 F.3d at 524 (citing *Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir. 2001)). The court "may
11 not affirm simply by isolating a specific quantum of supporting evidence." *Garrison v. Colvin*,
12 759 F.3d 995, 1009 (9th Cir. 2014) (quoting *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th
13 Cir. 2007)). "The ALJ is responsible for determining credibility, resolving conflicts in medical
14 testimony, and for resolving ambiguities." *Id.* (quoting *Andrews v. Shalala*, 53 F.3d 1035, 1039
15 (9th Cir. 1995)). "If the evidence can reasonably support either affirming or reversing, 'the
16 reviewing court may not substitute its judgment' for that of the Commissioner." *Gutierrez*, 740
17 F.3d at 524 (quoting *Reddick v. Chater*, 157 F.3d 715, 720-21 (9th Cir. 1996)). That being said,
18 "a decision supported by substantial evidence will still be set aside if the ALJ did not apply
19 proper legal standards." *Id.* (citing *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th
20 Cir. 2009); *Benton v. Barnhart*, 331 F.3d 1030, 1035 (9th Cir. 2003)). In addition, the court will
21 "review only the reasons provided by the ALJ in the disability determination and may not affirm
22 the ALJ on a ground upon which he did not rely." *Garrison*, 759 F.3d at 1010 (citing *Connett v.*
23 *Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003)).

III. DISCUSSION

A. ALJ's Findings in this Case

At step one, ALJ Kurlander found Plaintiff had not engaged in substantial gainful activity since the amended alleged onset date of March 12, 2013. (AR 420.)

At step two, ALJ Kurlander concluded Plaintiff had the following severe impairments: unspecified bipolar and related disorder by history, personality disorder, and social anxiety disorder. (AR 420.)

At step three, ALJ Kurlander determined Plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of one of the Listed Impairments. (AR 420 .)

At step four, ALJ Kurlander assessed Plaintiff as having the RFC to perform a full range of work at all exertional levels, but with the following nonexertional limitations: he is capable of routine and repetitive work and is expected to be off task 5% of the time; he is capable of frequent work around moving machinery, but no work at exposed heights; after any initial new-employee orientation period not to exceed one month in duration, there can be no more than occasional interaction with coworkers and supervisors, and no interaction with the general public. (AR 422.)

The ALJ then concluded Plaintiff had no past relevant work. (AR 430.)

At step five, ALJ Kurlander determined, based on VE Cummings's testimony, that considering Plaintiff's age, education, work experience and RFC, there were jobs that exist in significant numbers in the national economy that Plaintiff could perform, including: janitor, packager and laundry worker. (AR 431.) As a result, ALJ Kurlander found Plaintiff not disabled from March 12, 2013, through the date of the decision. (AR 431.)

1 **B. RFC**

2 Sheri J. Hixon-Brenenstall, Ph.D., conducted a consultative psychological evaluation of
3 Plaintiff on September 11, 2014. She opined that Plaintiff's social skills appeared sufficient to
4 engage in appropriate interactions with others as one would expect within various employment
5 settings. (AR 339.)

6 Paul Binks, Ph.D., conducted a second consultative psychological evaluation of Plaintiff
7 two years later, on December 10, 2016. He opined that Plaintiff could have occasional superficial
8 contact with coworkers and supervisors, but no contact with the general public. (AR 368.)

9 State agency reviewing psychologist Susan Kotler, Ph.D., opined on January 3, 2017, that
10 Plaintiff could perform simple, routine repetitive tasks in a setting that does not require frequent
11 or intensive contact with the public or coworkers. (AR 103.)

12 At Plaintiff's first hearing, ALJ Shave asked VE Cicero a hypothetical that included the
13 social limitations opined by Dr. Binks: never interacting with the public and only occasional
14 interaction with coworkers and supervisors. (AR 61.) VE Cicero identified the following jobs
15 that such an individual could perform: cleaner, stores labeler, and detailer. (AR 61.) Plaintiff's
16 counsel then asked VE Cicero whether there would be more than occasional contact with a
17 supervisor during the orientation and training period when someone is getting shown how to do
18 those job tasks. (AR 62.) VE Cicero responded affirmatively. (AR 63.) ALJ Shave then posed a
19 modified hypothetical to VE Cicero of an individual who is capable of frequent interaction with
20 a supervisor during orientation or training, but only occasional interaction with supervisors and
21 coworkers on an ongoing basis thereafter. (AR 64.) VE Cicero testified that the cleaner and
22 detailer positions would still be available as the individual would not have constant interaction
23 with the supervisor during the training period. (AR 65-66.)

1 In her decision finding Plaintiff not disabled, ALJ Shave gave significant weight to
2 Dr. Binks's opinions. (AR 22.) ALJ Shave assigned an RFC that Plaintiff could frequently
3 interact with supervisors during orientation or training, but then could only have occasional
4 interaction with supervisors and coworkers on an ongoing basis, and he could never interact with
5 the public. (AR 20.)

6 When the action was voluntarily remanded, the Appeals Council vacated ALJ Shave's
7 decision and remanded the case for resolution of certain issues. The Appeals Council specifically
8 found that ALJ Shave did not explain the basis of her conclusion that Plaintiff is capable of
9 frequent interaction with supervisors during orientation or training in light of Dr. Binks's opinion
10 that Plaintiff is limited to occasional contact with supervisors. (AR 514-515.)

11 On remand, ALJ Kurlander held a hearing and posed a hypothetical to VE Cummings
12 that included an individual who could have occasional interaction with coworkers and
13 supervisors, but no interaction with the general public. VE Cummings responded that such an
14 individual could perform the positions of janitor, packager, and laundry worker. (AR 463.)
15 Plaintiff's counsel then asked VE Cummings whether that individual would have more than
16 occasional contact with supervisors for the orientation period of those positions, and VE
17 Cummings responded affirmatively. (AR 467.) ALJ Kurlander then posed a modified
18 hypothetical that the individual could not have more than occasional interaction with coworkers
19 and supervisors and no interaction with the general public after any initial new employee
20 orientation period (that would not exceed one month). (AR 468.) VE Cummings testified there
21 would be no erosion in the jobs identified under that modified hypothetical. (AR 468.) VE
22 Cummings testified that most jobs have an orientation period for new employees, which is
23 generally two weeks, but could be up to 30 days. (AR 468-469.)

1 ALJ Kurlander assigned Plaintiff an RFC consistent with his modified hypothetical: after
2 any initial new employee orientation period not exceeding one month in duration, Plaintiff could
3 have no more than occasional interaction with coworkers and supervisors and no interaction with
4 the general public. (AR 422.)

5 ALJ Kurlander gave Dr. Hixon-Brenenstall's opinions partial weight, stating, in relevant
6 part:

7 [I]t is substantially supported by the findings of her mental status
8 exam and psychometric test results. However, I find the claimant is
9 slightly more limited than opined by Dr. Brenenstall, as I find that
10 after any initial new-employee orientation period not to exceed one
11 month in duration, there is to be no more than occasional
12 interaction with coworkers and supervisors, and no interaction with
13 the general public[.] ... In assigning these additional limitations, I
14 am giving the claimant the benefit of the doubt as to his subjective
15 complaints of feeling anxiety around groups of people and
16 generally uncomfortable when interact with others, although I also
17 acknowledge that he reports shopping for his own needs, an ability
18 to handle money, spending time with a couple of friends, as well as
19 talking on the phone on a daily basis with his sister and brother.

20 (AR 427.)

21 ALJ Kurlander also gave Dr. Binks's opinions partial weight, finding that Plaintiff could
22 have no more than occasional interaction with coworkers and supervisors and no interaction with
23 the general public, but that limitation applied *after* any initial new-employee orientation period
not exceeding one month in duration. (AR 429.)

ALJ Kurlander gave Dr. Kotler's opinion partial weight, again concluding that Plaintiff
was slightly more limited in that he could have no more than occasional interaction with
coworkers and supervisors and no interaction with the general public after any initial new-
employee orientation period not exceeding one month. (AR 429-430.) He reiterated that he was
giving Plaintiff the benefit of the doubt as to his subjective complaints of feeling anxiety around
groups and being generally uncomfortable when interacting with others. (AR 430.)

1 Plaintiff argues that ALJ Kurlander did not cite any evidence supporting his
2 determination that Plaintiff would have no social interactions during his first month of
3 employment. Instead, Plaintiff contends that ALJ Kurlander invented an RFC that allowed for a
4 significant number of jobs, and in doing so, he improperly manipulated the RFC findings to
5 reach a predetermined outcome of nondisability.

6 The Acting Commissioner argues that the ALJ did provide a basis for concluding that
7 Plaintiff retained sufficient social skills such that he could attend a training/orientation for the
8 jobs identified: the opinions of consultative examining psychologist, Dr. Hixon-Brenenstall, and
9 State agency reviewing psychologist, Dr. Kotler.

10 The problem with the Acting Commissioner's argument is that with respect to the social
11 limitations, ALJ Kurlander found that Plaintiff was *more* limited than Dr. Hixon-Brenenstall or
12 Dr. Kotler opined. The ALJ also adopted Dr. Binks' social limitations except as to a one-month
13 period of new-employee orientation or training. Moreover, Dr. Kotler opined Plaintiff could
14 perform tasks in a setting that does *not* require *frequent or intensive* contact with the public or
15 coworkers. VE Cummings testified that the orientation period would require more than
16 occasional contact with supervisors. (AR 467.) As such, ALJ Kurlander's RFC appears to
17 conflict with Dr. Kotler's opinion that Plaintiff could not engage in frequent or intensive contact
18 with coworkers.

19 Importantly, despite the Appeals Council's explicit instructions, ALJ Kurlander still did
20 not explain why he credited Dr. Binks' opinion that Plaintiff could have only occasional
21 interaction with coworkers and supervisors and no interaction with the public, but found Plaintiff
22 was capable of frequent interaction with supervisors and coworkers for up to a month during the
23

1 training or orientation period. The court finds ALJ Kurlander erred in failing to address this
 2 conflict, and remand is appropriate on this basis.

3 **C. Dr. Binks's Opinions**

4 Preliminarily, Plaintiff argues that *both* ALJs failed to adequately address Dr. Binks's
 5 opinions; however, the Appeals Council already vacated ALJ Shave's decision. Therefore, the
 6 court is only concerned with whether ALJ Kurlander adequately addressed Dr. Binks's opinions.

7 Plaintiff argues that ALJ Kurlander did not set forth valid reasons for rejecting
 8 Dr. Binks's opinions that Plaintiff would be limited to interacting with supervisors no more than
 9 occasionally, and that Plaintiff would be expected to have frequent periods of decompensation.

10 This claim was filed before March 27, 2017; therefore, the following analysis applies¹:

11 "Courts 'distinguish among the opinions of three types of physicians: (1) those who treat
 12 the claimant (treating physicians); (2) those who examine but do not treat the claimant
 13 (examining physicians); and (3) those who neither examine nor treat the claimant (nonexamining
 14 physicians).'" *Garrison v. Colvin*, 759 F.3d 995,1012 (9th Cir. 2014) (quoting *Lester v. Chater*,
 15 81 F.3d 821, 830 (9th Cir. 1995)).

16 For claims filed before March 27, 2017, 20 C.F.R. §§ 404.1527 and 416.927 govern how
 17 an ALJ must weigh medical evidence. Those regulations afford "treating sources" controlling
 18 weight in certain circumstances. *See also* Social Security Ruling (SSR) 96-2p, 1996 WL 374188
 19 (July 2, 1996).² Even when the treating sources are not given controlling weight, they are still
 20 entitled to deference. *Id.*

21
 22 ¹ New regulations apply to claims filed on or after March 27, 2017, which change the framework
 23 of how ALJ's evaluate medical opinion evidence. *See* 20 C.F.R. §§ 404.1520c, 416.920c.

² SSRs are "final opinions and orders and statements of policy and interpretations" issued by the
 Commissioner. 20 C.F.R. § 402.35(b)(1). Although they do not have the force of law, in the

1 The Ninth Circuit has similarly held that “[a]s a general rule, more weight should be
2 given to the opinion of a treating source than to the opinion of doctors who do not treat the
3 claimant.” *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014) (citation and quotation marks
4 omitted). “[T]he opinion of a treating physician is thus entitled to greater weight than that of an
5 examining physician, [and] the opinion of an examining physician is entitled to greater weight
6 than that of a non-examining physician.” *Id.* (citation omitted). “If a treating physician’s opinion
7 is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is
8 not inconsistent with the other substantial evidence in [the] case record, [it will be] given
9 controlling weight.” *Ghanim v. Colvin*, 763 F.3d 1154, 1160 (9th Cir. 2014) (citation and
10 quotation marks omitted); *see also Revels v. Berryhill*, 874 F.3d 648, 854 (9th Cir. 2017) (citing
11 20 C.F.R. § 404.1527(c)(2)). “The weight afforded a non-examining physician’s testimony
12 depends on the degree to which [he or she] provide[s] supporting explanations for [his or her]
13 opinions.” *Garrison*, 759 F.3d at 1012 (citation and quotation marks omitted).

14 "To reject [the] uncontradicted opinion of a treating or examining doctor, an ALJ must
15 state clear and convincing reasons that are supported by substantial evidence.” *Ryan v. Comm’r*
16 *of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008) (citation omitted). To reject a treating or
17 examining doctor’s opinion that is contradicted by another doctor’s opinion, the ALJ must
18 “provid[e] specific and legitimate reasons that are supported by substantial evidence.” *Garrison*,
19 759 F.3d at 1012 (citation and quotation marks omitted).

20 “[E]ven when contradicted, a treating or examining physician’s opinion is still owed
21 deference and will often be ‘entitled to the greatest weight ... even if it does not meet the test for
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23 _____
Ninth Circuit they are given deference "unless they are plainly erroneous or inconsistent with the
Act or regulations." *Quang Van Han v. Bowen*, 882 F.2d 1453, 1457 (9th Cir. 1989).

1 controlling weight.” *Garrison*, 759 F.3d at 1012 (quoting *Orn v. Astrue*, 495 F.3d 625, 633 (9th
2 Cir. 2007)). “An ALJ can satisfy the ‘substantial evidence’ requirement by ‘setting out a detailed
3 and thorough summary of the facts and conflicting clinical evidence, stating his interpretation
4 thereof, and making findings.” *Garrison*, 759 F.3d at 1012 (quoting *Reddick*, 157 F.3d at 725).
5 ““The ALJ must do more than state conclusions. He must set forth his own interpretations and
6 explain why they, rather than the doctors’, are correct.”” *Id.* (citation omitted).

7 Dr. Binks opined, among other things, that Plaintiff could have occasional, superficial
8 contact with coworkers and supervisors, but no contact with the public; and that he could be
9 expected to have frequent periods of decompensation. (AR 368.) Dr. Binks’s opinions are
10 contradicted by those of Dr. Hixon-Brenenstall. Therefore, to reject Dr. Binks’s opinions, ALJ
11 Kurlander was required to set forth specific and legitimate reasons supported by substantial
12 evidence.

13 ALJ Kurlander gave Dr. Binks’s opinions partial weight. First, ALJ Kurlander found
14 Dr. Binks’s opinions not entirely consistent with the medical evidence of record, stating that Dr.
15 Binks performed a one-time consultative psychological evaluation on December 10, 2016. On
16 January 3, 2017, the State psychological consultant was aware of his opinions, but did not adopt
17 them verbatim. (AR 429.) While the length, nature, and extent of the treatment relationship are
18 relevant (20 C.F.R. §§ 404.1527(c), 416.927(c)), the only other examining opinion in the record
19 was also a one-time consultative psychological evaluation by Dr. Hixon-Brenenstall. ALJ
20 Kurlander did not discount Dr. Hixon-Brenenstall’s opinions on this basis.

21 Second, ALJ Kurlander noted that Dr. Binks had no medical records to review, citing
22
23

1 Dr. Binks’s statement that “collateral information was not available,” and finding, as a result,
2 that Dr. Binks did not have a longitudinal perspective. (AR 429.) A review of Dr. Binks’s report
3 reveals that Dr. Binks *did* review the medical evidence of record provided by DDS, which
4 Dr. Binks considered in the overall assessment of Plaintiff. (AR 364.) Dr. Binks noted that
5 collateral information was not available with respect to Plaintiff’s reports of a history of anxiety,
6 schizophrenia, PTSD, and bipolar disorder, which began at age 10. (AR 364.) Therefore, it
7 appears that Dr. Binks did review whatever medical records were provided to him, but not older
8 records documenting Plaintiff’s mental health issues, which had not been made available and are
9 not contained with the Administrative Record. In fact, the Administrative Record in this case
10 contains only a few mental health records, and they begin in 2013.

11 Third, ALJ Kurlander found that Plaintiff was not entirely candid with Dr. Binks, because
12 he denied a history of alcohol or substance abuse, when the record documents a history of
13 cannabis abuse in sustained remission. (AR 429.) Plaintiff’s candor is a legitimate area of inquiry
14 for the ALJ. However, Plaintiff also denied any substance use history to Dr. Hixon-Brenenstall,
15 (though the psychologist did mention that Plaintiff’s records documented a history of cannabis
16 abuse in sustained remission). (AR 335.) If Plaintiff’s lack of candor regarding his cannabis use
17 history was a reason to discount Dr. Binks’s opinions, it should have also been used to discount
18 Dr. Hixon-Brenenstall’s opinions.

19 Fourth, ALJ Kurlander concluded that Dr. Binks’s “rather extreme opinion” was
20 speculative and contradicted by Plaintiff’s reported activities of daily living and demonstrated
21 abilities on the mental status exam, such as his having friends, being able to drive, play video
22 games, being responsible for taking care of multiple pets, and attaining 28 out of 30 on the
23 MMSE. (AR 429.)

ALJ Kurlander does not explain how Dr. Binks's opinion was speculative. Moreover, as will be discussed in further detail below, none of the cited activities are inconsistent with the social interaction limitations assessed by Dr. Binks.

Finally, ALJ Kurlander did not specifically discuss Dr. Binks's opinion that Plaintiff would have frequent episodes of decompensation as instructed by the Appeals Council. (AR 514.) In fact, ALJ Kurlander does not even mention this opinion in his summary of Dr. Binks's findings. (AR 428-29.) As such, ALJ Kurlander erred.

In sum, the court finds ALJ Kurlander did not set forth specific and legitimate reasons supported by substantial evidence for discounting Dr. Binks's opinions.

D. Plaintiff's Subjective Symptom Testimony

1. Standard for Evaluating Subjective Symptom Testimony

Evaluating a claimant's subjective symptom testimony "becomes important at the stage where the ALJ is assessing residual functional capacity, because the claimant's subjective statements may tell of greater limitations than can medical evidence alone." *Tonapetyan v. Halter*, 242 F.3d 1144, 1147 (9th Cir. 2001) (citing Social Security Ruling (SSR) 96-7P)).³

"Such testimony is inherently subjective and difficult to measure." *Coleman v. Saul*, 979 F.3d 751, 755-56 (9th Cir. 2020). This evaluation is often crucial to a finding of disability. *Id.* (citing *Fair v. Bowen*, 885 F.2d 597, 602 (9th Cir. 1989)).

There is a two-step test for evaluating a claimant's subjective symptom testimony:

First, the ALJ must determine whether the claimant has presented objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged. In this analysis, the

³ SSA previously referred to this as a credibility determination. SSR 96-7P. SSA subsequently eliminated use of the term "credibility." SSA has clarified that "subjective symptom evaluation is not an examination of an individual's character." Instead, the adjudicator considers all of the evidence in evaluating the intensity and persistence of a claimant's symptoms. SSR 16-3P.

1 claimant is *not* required to show that her impairment could reasonably be
2 expected to cause the severity of the symptom she has alleged; she need only
3 show that it could reasonably have caused some degree of the symptom. Nor must
a claimant produce objective medical evidence of the pain or fatigue itself, or the
severity thereof.

4 If the claimant satisfies the first step of this analysis, and there is no evidence of
5 malingering, the ALJ can reject the claimant's testimony about the severity of her
6 symptoms only by offering specific, clear and convincing reasons for doing so.
This is not an easy requirement to meet: The clear and convincing standard is the
most demanding required in Social Security cases.

7 *Garrison v. Colvin*, 759 F.3d 995, 1014-15 (9th Cir. 2014) (internal quotation marks and
8 citations omitted, emphasis original).

9 An ALJ may consider various factors in evaluating the allegedly disabling subjective
10 symptoms, including: daily activities; the location, duration, frequency, and intensity of pain or
11 other symptoms; precipitating and aggravating factors; the type, dosage, effectiveness, and side
12 effects of any medication taken to alleviate symptoms; treatment, other than medication, received
13 for relief of symptoms; any measures a claimant has used to relieve symptoms; and other factors
14 concerning functional limitations and restrictions due to pain or other symptoms. 20 C.F.R.
15 § 404.1529(c), § 416.929(c); SSR 16-3P.

16 **2. Plaintiff's Testimony**

17 Plaintiff testified that he was 27 years old at the time of the second hearing. He lived with
18 his mother and brother. He did not complete high school and does not have a GED. He dropped
19 out of school because he would have panic attacks that caused him to black out.

20 He testified that he could not work because of his mental health issues, including having
21 panic attacks, not being able to go anywhere or be in large groups of people (which he defined as
22 5-6 people), and he experiences manic upswings and downswings in mood. When he has a manic
23 downswing, he is depressed and does not want to get out of bed. In a manic upswing, he does not

1 sleep for long periods of time. He goes through these swings every couple of months. He was not
2 receiving treatment for his mental health issues because he felt the doctors only tried to put him
3 on medications that caused side effects that were worse than his symptoms. He also experiences
4 shakiness in his hands constantly, and sometimes in his legs. He testified that he experiences bad
5 days every day or two. Sometimes his mood swings result in angry outbursts. He tries to avoid
6 crowds, which trigger his anxiety.

7 He can drive, although he does not have a driver's license. He plays video games once in
8 a while and builds things. He takes care of pets. He has no problems with personal care, but he
9 needs to be reminded to take a shower. He prepares meals such as sandwiches and ramen
10 weekly. He goes outside, but he does not go into town. On a good day, he might be able to go to
11 the store. On a bad day, he has to stay home. He also testified that when his mother goes
12 shopping, he will go and stay in the car. He talks to his brother and sister on the phone daily. He
13 will go to his grandmother's house when she calls him or needs his help. Otherwise, he does not
14 go out and does not date or go to social functions because he cannot handle crowds. When asked
15 if he has problems getting along with family, friends, neighbors or others, he responded: "No, I
16 mind my own business." (AR 255-261, 449-461.)

17 **3. Analysis**

18 ALJ Kurlander found Plaintiff's medically determinable impairments could reasonably
19 be expected to cause the alleged symptoms. However, he found Plaintiff's statements
20 concerning the intensity, persistence, and limiting effects of the symptoms were not entirely
21 consistent with the medical and other evidence in the record. (AR 423.) As such, the court must
22 determine whether ALJ Kurlander set forth specific, clear and convincing reasons supported by
23 substantial evidence for discounting Plaintiff's subjective symptom statements.

1 ALJ Kurlander said that Plaintiff's activities of daily living show he is not as limited as
2 alleged. ALJ Kurlander pointed out that Plaintiff takes care of his personal care; he refuses to
3 take any medications; he cares for pets, prepares simple meals and helps with mowing, weeding,
4 and cleaning; he goes outside in the yard; when he goes out, he travels by riding in a car; he
5 drives a car (but does not have a driver's license); he can pay bills and count change; he plays
6 video games, fiddles with electronics and works on cars; he talks to his sister and brother on the
7 phone on a daily basis; he goes to his grandmother's house on a regular basis; he has no
8 problems getting along with others; he finishes what he starts and follows spoken instructions
9 well; and changes in routine do not bother him. (AR 423-24.)

10 "Engaging in daily activities that are incompatible with the severity of symptoms alleged
11 can support an adverse credibility determination." *Ghanim v. Colvin*, 763 F.3d 1154, 1165 (9th
12 Cir. 2014) (citations omitted). "Recognizing that 'disability claimants should not be penalized for
13 attempting to lead normal lives in the face of their limitations,' we have held that '[o]nly if [his]
14 level of activity were inconsistent with [a claimant's] claimed limitations would these activities
15 have any bearing on [his] credibility.'" *Garrison v. Colvin*, 759 F.3d 995, 1016 (9th Cir. 2014)
16 (quoting *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998)).

17 ALJ Kurlander does not explain how any of the activities listed are inconsistent with
18 Plaintiff's claimed social limitations. Chiefly, Plaintiff claims he cannot work because he has
19 anxiety and panic attacks, fears crowds of more than 5 or 6 people, and has bipolar mood swings.
20 Being able to engage in personal care, prepare a few simple meals, doing chores and limited
21 hobbies alone are not at odds with Plaintiff's fear of being around larger groups of people. Nor is
22 the fact that Plaintiff talks to his brother and sister on the phone and goes to his grandmother's
23 house incongruent with his claimed limitations. ALJ Kurlander says that Plaintiff has no

1 problems getting along with others, but Plaintiff's statement was that he does not have a problem
2 *because he minds his own business*. While Plaintiff testified that he could go to the store to buy a
3 pack of cigarettes on a good day. However, he testified he has bad days every couple of days.
4 There was no question about how many people he was around in the store or whether he avoided
5 people while in the store. He also testified that when his mother goes shopping, he sits in the car
6 with the doors locked. ALJ Kurlander pointed out that Plaintiff refuses to take medication, but
7 Plaintiff testified that he does not take medication because the side effects were worse than his
8 symptoms.

9 In sum, the court finds that ALJ Kurlander did not set forth specific, clear and convincing
10 reasons supported by substantial evidence for discounting Plaintiff's subjective symptom
11 statements.

12 **E. Remand**

13 Plaintiff argues that his case should be remanded for the payment of benefits under the
14 credit-as-true rule. The Acting Commissioner contends the proper remedy is remand for further
15 administrative proceedings.

16 The credit-as-true rule "permits, but does not require, a direct award of benefits on review
17 but only where the [ALJ] has not provided sufficient reasoning for rejecting testimony and there
18 are no outstanding issues on which further proceedings in the administrative court would be
19 useful. Then, and only under these circumstances, if a claimant's testimony is credited as true an
20 award of benefits *may* be appropriate." *Leon v. Berryhill*, (9th Cir. Jan. 25, 2018) (citing
21 *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1101-02 (9th Cir. 2014)). "An
22 automatic award of benefits in a disability benefits case is a rare and prophylactic exception to
23 the well-established ordinary remand rule." *Id.* (citing *Treichler*, 775 F.3d at 1100).

1 “First, we ask whether the ‘ALJ failed to provide legally sufficient reasons for rejecting
2 evidence, whether claimant testimony or medical opinion.’” *Id.* (citing *Garrison*, 759 F.3d at
3 1020). “Next, we determine ‘whether there are outstanding issues that must be resolved before a
4 disability determination can be made , ...and whether further administrative proceedings would
5 be useful.’” *Id.* (quoting *Treichler*, 775 F.3d at 1101)). “When these first two conditions are
6 satisfied, we then credit the discredited testimony as true for the purpose of determining whether,
7 on the record taken as a whole, there is no doubt as to disability.” *Id.* (quoting *Treichler*, 775
8 F.3d at 1101) (internal quotation marks omitted).

9 The court declines to remand for an award of benefits. The court finds the ALJ failed to
10 provide legally sufficient reasons for rejecting evidence. However, there remain issues that must
11 be resolved at the hearing level before a disability determination can be made. For example, it is
12 unclear whether jobs exist that Plaintiff could perform that would require only occasional contact
13 with supervisors or coworkers during the orientation or training period, in order to be consistent
14 with Dr. Binks’s assessed social limitations. In addition, an ALJ must actually assess Dr. Binks’
15 opinion that Plaintiff would suffer from episodes of decompensation. The Acting Commissioner
16 is cautioned, however, that because the ALJs have already had two “bites at the apple” on this
17 issue, a future error in this regard may well result in a remand for payment of benefits.

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IV. CONCLUSION

Plaintiff's motion for reversal and/or remand (ECF No. 20) is **GRANTED**;

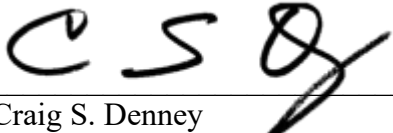
The Commissioner's cross-motion (ECF No. 21) is **DENIED**;

This matter is **REMANDED** for further proceedings consistent with this Order.

The Clerk shall enter **JUDGMENT** accordingly.

IT IS HEREBY ORDERED.

Dated: April 6, 2022



Craig S. Denney
United States Magistrate Judge